No. 75-731

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

SUN OIL COMPANY, GENERAL CRUDE OIL COMPANY, M. H. MARR, CONTINENTAL OIL COMPANY,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PHILADELPHIA GAS WORKS DIVISION OF UGI CORPORATION, TEXAS EASTERN TRANSMISSION CORPORATION, FEDERAL POWER COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION

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The Public Service Commission of the State of New York, a petitioner below and a respondent here, opposes the petition for a writ of certiorari filed by Sun Oil Company *et al.*

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, in determining the refunds that were properly due under a 1969 Federal Power Commission order granting initial certification for a sale of natural gas that had commenced in 1959 without lawful certificate authority, the court of appeals was required to utilize the rate contained in a 1971 area rate settlement—from which the instant sale had been expressly excluded—rather than the just and reasonable rate in effect in 1969.

2. Whether, in affirming the Federal Power Commission's action in requiring, as a condition to certification under Section 7 of the Natural Gas Act, the conversion of a purported lease-sale of discovered reserves into a conventional sale of gas as produced, the court of appeals erred in limiting the total consideration to be received by the seller to the consideration (adjusted upward for the time-value of money) called for in the seller's contract.

STATEMENT

The background of this much litigated proceeding—now in its nineteenth year and completing its third journey through the appellate courts—is cogently summarized (through 1965) in Mr. Justice Harlan's opinion for this Court in *United Gas Improvement Co.* v. *F.P.C.*, 381 U.S. 392 at 395-99 (1965), and (through 1974) in Judge Robinson's opinion for the court below (Pet. App. A, pp. A-8 to A-22). Both for that reason and also because the issues raised by the petition for certiorari are limited in scope, we include here only those facts essential to an understanding of the issues presented.

In 1957, the four petitioners—Continental Oil Company, Sun Oil Company, General Crude Oil Company, and M. H. Marr—contracted to sell their gas to be produced from the Rayne Field in southern Louisiana to

Texas Eastern Transmission Corporation at an initial price of 23.9¢ per Mcf, substantially higher than any price theretofore proposed for interstate sales in this area, and sought certificate authority from the Federal Power Commission to commence such sale. Following the Third Circuit's 1958 reversal of the Commission's unconditional certification of the 22.4¢ Catco sale,[1] the Rayne producers and Texas Eastern recast their transaction in the form of a "lease-sale", under which the Rayne Field leaseholds would be transferred to Texas Eastern for a lump sum payment of $134,395,700.

Although, depending on assumptions as to ultimate recovery, the unit cost under the lease-sale arrangement would be at least as high as the 23.9¢ contract price, the Commission, in June 1959, granted Texas Eastern certificate authority to effectuate the lease sale, *Texas Eastern Transmission Corp.*, FPC Opinion No. 322, 21 FPC 860.[2] On appeal, the D.C. Circuit reversed, holding that the $134 million cost had not been shown to be justified, *Public Service Commission of New York* v. *F.P.C.*, 109 U.S. App. D.C. 289, 287 F.2d 143 (1960). Notwithstanding the pendency of the ultimately successful appeal, the Rayne Field producers commenced deliveries in mid-1959, and have continued deliveries continuously since.

On remand, the Commission concluded that the sellers' change of the transaction from a conventional sale of gas to a sale of the underlying leases did not affect the

[1] *Public Service Commission of New York* v. *F.P.C.*, 257 F.2d 717 (3rd Cir. 1958), *aff'd sub nom. Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959). Prior to the Rayne proposal, the 22.4¢ Catco price had represented the maximum for the area.

[2] In its 1959 opinion, the Commission assumed that, because of the lease-sale form of the transaction, it lacked jurisdiction over the sellers and that its sole jurisdiction was over the purchaser, Texas Eastern.

Commission's certificate jurisdiction over the sellers under Section 7 of the Act, and directed the sellers to file applications for certificates to make the sale, *Texas Eastern Transmission Corp.*, FPC Opinion No. 378, 29 FPC 249 (1963). The producers appealed the Commission's jurisdictional holding to the Fifth Circuit, which reversed, *Marr* v. *F.P.C.*, 336 F.2d 320 (5th Cir. 1964); however, this Court granted certiorari, vacated the Fifth Circuit's judgment, and sustained the Commission's holding that it had jurisdiction over the lease-sale transaction, *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965).

Following further hearings before the Commission, a Commission Examiner in 1968 ruled that the producers should refund to Texas Eastern (for refund to Texas Eastern's customers) all amounts collected for 1959-68 deliveries in excess of the 20¢ in-line level (for which the just-and-reasonable level, when arrived at in the nearly concluded area rate proceeding, should be substituted), 42 FPC 455. Shortly after the Examiner's decision in the Rayne case, the Commission issued its final opinion in the area rate case, fixing a just-and-reasonable maximum of 18.5¢ per Mcf for gas of the Rayne Field vintage, *Southern Louisiana Area Rate Proceeding*, FPC Opinion No. 546, 40 FPC 530 (1968), *aff'd sub nom. Austral Oil Co.* v. *F.P.C.*, 428 F.2d 407 (5th Cir. 1970), *cert. denied*, 400 U.S. 950. Thereafter, in August 1969, the Commission issued its basic order reviewed by the court below, FPC Opinion No. 565, 42 FPC 376. So far as pertinent here, the Commission in Opinion No. 565 utilized the 18.5¢-per-Mcf just and reasonable level for sales *after* October 1, 1968 (the effective date of the Southern Louisiana Area Rate opinion), but, with one Commissioner dissenting, utilized the prior in-line price of 20¢ per Mcf to compute refunds for deliveries prior to October 1, 1968. The Commission

further provided that when payments at the revised 20¢ and 18.5¢ levels reached the original price of $134 million, further payments should cease. Petitions for rehearing of Opinion No. 565 were filed by various parties, and, following a lapse of over a year, the Commission in September 1970 entered its order on rehearing, Opinion No. 565-A, 44 FPC 1079, in which it deferred indefinitely any action on the refund issue, and removed the $134 million contract limitation on payments to the producers.

On appeal, the court below, in an unusually comprehensive and scholarly opinion issued March 25, 1974 (Pet. App. A pp. A-1 to A-135), examined with care every contention urged by the various petitioners, concluding, on the points raised by the present petition for certiorari, that the proper refund level for all periods prior to August 1971 (the effective date of a new area rate level promulgated by the FPC in 1971) was the 18.5¢ just and reasonable ceiling fixed by the Commission's 1968 area rate order, and that the total revenues received by the producers, when appropriately adjusted for the time value of money, should not exceed the $134 million price fixed in the original lease-sale contract. In conjunction with the producers' petitions for rehearing, copies of this Court's June 1974 opinion in *Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 283, were lodged with the court below; in denying rehearing (Pet. App. C, pp. C-1 to C-22), the court ruled that nothing in *Mobil* affected the propriety of the 18.5¢ refund level for pre-1971 sales.

REASONS FOR DENYING THE WRIT

Although this case has been pending for almost nineteen years—during which time it has been the subject of five Examiner's decisions, three Commission opinions, three court of appeals' opinions, and one prior opinion by this Court—the issues sought to be raised by the pe-

tition for certiorari are exceedingly narrow in scope, affecting no general Commission policy, and indeed having no impact on any other proceeding pending before the Commission. The key issue originally raised by the Rayne Field lease-sale transaction was whether the effect of FPC jurisdiction could be avoided by casting a sale in this form, and following the original 1959 opinion by the Commission in this case, other lease-sales were proposed. But once this Court, in its 1965 decision in this case, ruled that FPC jurisdiction applied to the sale of developed leaseholds, no new lease-sales were proposed. The opinion of the court below—dealing with the procedures to be followed to conform a sale improperly commenced as a lease sale to a sale consistent with the public convenience and necessity—is thus *sui generis*, and warrants no intervention by this Court.

On the major issue presented by the petition for certiorari, petitioners do *not* contend that the court below erred in requiring refunds of past overcollections, nor do they contend that the court erred in requiring refunds down to the Commission-determined just-and-reasonable rate level. Petitioners contend merely that the only just-and-reasonable level appropriate for refunds was that approved by the Commission in its 1971 order approving a rate settlement in the second-round Southern Louisiana proceeding.

The essential difficulty with petitioners' position, however, is that petitioners fail to mention—and in consequence fail to suggest any error inhering in—the court of appeals' rationale for refusing to use the 1971 rate settlement level as the refund floor. In its opinion, the court of appeals noted that in 1971, while the Rayne proceeding was pending on appeal, the Commission had, by Opinion No. 598, approved a settlement increasing the Southern Louisiana area rate ceilings, but the court

explained with irrefutable logic why the new ceilings could not affect the determination of refunds for Rayne Field deliveries prior to 1971 (Pet. App. A-132 to A-133, footnotes omitted):

> "Very importantly, however, neither the settlement proposal nor Opinion No. 598 or its related order embraced the refund questions presented in the case at bar. The settlement proposal explicitly admonished that '[t]he terms hereof do not dispose of any issues in the *Rayne Field* (Docket No. G-12446, *et al.*) . . . proceedings'—the litigation now before us—and its refund provisions were expressly made subject to that exclusion. In turn, the Commission, in its words in Opinion No. 598, 'adopt[ed] those provisions of the settlement proposal which prescribe[d] the . . . refund provisions for deliveries made.' And just as the settlement proposal defined the transactions subject to refund in terms excluding the gas sales involved here, so did the order accompanying Opinion No. 598.
>
> "We need not, in these circumstances, consider whether Opinion No. 598 could in any event effect the refunds and flow-through issues which the Commission was called on to resolve several years previous to its promulgation. The critical fact is that Opinion No. 598 left those issues untouched. For that reason, we have concluded that our disposition of the refund and flow-through questions presented on this review must remain uninfluenced by Opinion No. 598."

And, in its opinion on rehearing, the court below, while noting that the higher Opinion No. 598 rate would, under Opinion No. 565, fix the rate for Rayne Field gas sold after August 1, 1971, reaffirmed its view that Opinion No. 598, *by its express terms*, was intended to leave the refund obligation of the Rayne producers exactly where

it would be absent Opinion No. 598 (Pet. App. C-14, footnotes omitted):

> "We concluded in our original opinion that neither Opinion No. 598 nor its related order itself undertook to extend the Commission's retroactive refund formula toward resolution of that question. We pointed out that the settlement agreement underlying Opinion No. 598 stated unequivocally that its provisions would not dispose of any issue confronting us in this litigation; that the refund provisions of the settlement agreement were expressly made subject to that exclusion; that Opinion No. 598 expressly adopted the refund provisions of the settlement agreement as written; and that the order accompanying Opinion No. 598 defined the transactions subject to refund in terms excluding the gas deliveries involved here. We said that '[w]e need not, in these circumstances, consider whether Opinion No. 598 could in any event affect the refund and flow-through issues which [in the instant case] the Commission was called on to resolve several years previous to its promulgation,' for '[t]he critical fact is that Opinion No. 598 left those issues untouched.' All applicants for rehearing seem to concede the validity of that conclusion, and we continue our alliance with it."

Petitioners' present claim that the decision of the court below is inconsistent with Opinion No. 598 and the opinions of the Fifth Circuit and this Court affirming Opinion No. 598 thus rests on the totally mistaken assumption that Opinion No. 598 was designed to govern the Rayne Field refunds. In fact, as the court below recognized, the contrary is true: the Rayne refunds were specifically and deliberately excluded from Opinion No. 598. Thus, petitioners' present position constitutes a collateral attack on Opinion No. 598, and it is the petition for certiorari, and not the opinion of the court below,

that is inconsistent with FPC Opinion No. 598 and the court decisions affirming that opinion.[3]

Petitioners also challenge (Pet. 20-24) the court of appeals' reinstatement, at Texas Eastern's instance, of the original Opinion No. 565 condition limiting the producers' ultimate recovery to the $134 million called for in their contracts with Texas Eastern. Since the court adjusted the limitation to give the producers the benefit of the time value of the payment schedule contemplated by the original contracts, it is difficult to perceive how the producers are legally injured by the condition: their only possible loss is that they will not receive *more* than they bargained for. In any event, petitioners have failed to show that, in limiting ultimate recovery to the contract level, the decision of the court below was inconsistent with any decision of this Court or with the decision of any other circuit, or impaired in any way the Commission's discharge of its statutory functions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[3] Petitioners' contention (Pet. 19-20) that the decision below is unlawfully discriminatory in that it subjects them to higher refund obligations than other producers in the area has, as noted by the court below on rehearing (Pet. App. C-12 to C-13), been rejected by this Court's opinion in *Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 283 at 324-25.